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MEMORANDUM OF LAW

DATE: June 24, 2016

TO: John Helminski, Assistant Director, Public Utilities Department

FROM: City Attorney

SUBJECT: Transmission of Electricity from Cogeneration Facility at Metro Biosolids Center to Advanced Water Treatment Facility at North City Water Reclamation Plant

INTRODUCTION

The Public Utilities Department (PUD) has begun planning for the Pure Water Program. The initial phase of the program will involve the development of an Advanced Water Purification Facility (Purification Facility) at the site of the existing North City Water Reclamation Plant (NCWRP). City staff anticipates that the Purification Facility will have a treatment capacity of approximately 30 million gallons per day, and it will have an operational demand for electricity of up to 20 megawatts (MW). To meet this electrical demand, PUD plans to develop a cogeneration facility of up to 20 MW[1] capacity to be fueled primarily by an incremental volume of landfill gas (LFG) from the Miramar Landfill that is not already dedicated to existing electrical generating units that are operational. The existing units are at (1) the Metro Biosolids Center (MBC), which is on the City's leasehold at Marine Corps Air Station Miramar (MCASM), and (2) at NCWRP, which lies two miles to the north of MBC, off the MCASM base and north of Miramar Road. Digester gas from the MBC digesters would supplement the LFG supply. The LFG and digester gas fuel supplies for the new cogeneration plant may need to be augmented with natural gas, but LFG and digester gas are expected to be the majority fuel source. PUD may wish to locate the new cogeneration facility at MBC, near the landfill, close to where the LFG and digester gas is located and where space is available, rather than at the NCWRP where the Purification Facility electrical load will be and where space will be limited.

Under this conceptual arrangement the electricity generated from the new 20 MW facility at MBC would be delivered to meet the Purification Facility load via a City-owned transmission line proposed to be built in a widened easement that would follow the same route as the existing

[1] The actual capacity of the new generating facility has not been decided and may be less than 20 MW depending on eventual design of the Purification Facility. 20 MW is an assumed capacity based on current estimates.

sludge, centrate, and LFG pipelines. This route runs primarily in one easement granted by the Navy in 1995 which extends from MBC across MCASM to Miramar Road. The additional easement area would in concept be granted by the Navy and the transmission line would need to cross Miramar Road (a public street) underground in the same manner as the existing pipelines. Under this scenario, all of the electricity produced would be sold or delivered to (1) the Purification Facility and/or the NCWRP; (2) to a Class A Biosolids processing facility to be developed simultaneously at the MBC site; or (3) to San Diego Gas & Electric Company (SDG&E) on an as-available basis. None of the electricity from the new 20 MW plant would be sold to other customers.[2] The cogeneration plant would also produce thermal energy which could be used in the operation of the Class A Biosolids Facility at MBC. The thermal energy would only be sold to the City or its Class A Biosolids Facility operator. At this time it has not been determined whether the new cogeneration and Class A Biosolids facilities would be privately or City owned, but the services of those facilities would in either case be dedicated entirely to the City's water purification and sewage sludge disposal functions. The Purification Facility will be City owned and operated.

The present issues arose from PUD's past experience with the Point Loma Gas Utilization Facility which provided a general understanding that non-utility generators are typically prevented by law from transmitting or distributing electricity from one property to another non-adjacent property or across public streets in the absence of specific and limited circumstances. The facts in this situation prompted these questions for several reasons: the locations of MBC and NCWRP; the interests in real property at and near MCASM; and a public street between MCASM and NCWRP.[3] The questions were also prompted by the likely private ownership of the new cogeneration facility and the prospect of that owner selling the electricity to customers not on the generating plant site.

QUESTIONS PRESENTED

1. May the City or private developer own and operate a new 20 MW LFG and digester gas fueled cogeneration facility at MBC sell or deliver electricity across Miramar Road to the Purification Facility at NCWRP without becoming a "public utility" or an "electrical corporation" subject to the jurisdiction of the California Public Utilities Commission (CPUC)?

2. Is there a market mechanism by which the new cogeneration facility owner could sell electricity to SDG&E on an as-available or contract basis before the Purification Facility is developed, or when generation may exceed City requirements?

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[2] Some of the incrementally available LFG may be dedicated to a new 1.6 MW cogeneration facility jointly developed to serve the Navy at MCASM. This analysis assumes that such a facility would be separate and would serve loads on the Navy's own property.

[3] This memorandum describes certain Navy titles and easements that have been granted to the City by the Navy. We recommend that a review of title be performed for relevant parcels by the Real Estate Assets Department to confirm legal descriptions and boundaries of interests and permissible uses that are presumed in this analysis based upon initial review of the easements provided.

SHORT ANSWERS

1. Yes. Generally and subject to two principal conditions contained in California Public Utilities Code section 218(b)(3),[4] the City or a private developer may, without becoming subject to the jurisdiction of the CPUC, own a new LFG and digester gas fueled cogeneration facility at MBC which sells or delivers electricity via a non-utility transmission line solely to the Purification Facility at NCWRP, to on-site load at the MBC property, or on an as-available basis to SDG&E via an interconnection at MBC, even if the transmission line to NCWRP crosses Miramar Road as an intervening public street between NCWRP and MCASM. The two conditions are: (1) the electrical generating plant must meet the legal definition of "cogeneration technology" by beneficially using a statutory minimum amount of the waste heat from the generating units, and (2) the load at the Purification Facility must remain load of the City as a "local public agency," and may not be private load. If these conditions are met the electrical plant owner will not be a "public utility" or an "electrical corporation" and will not be subject to the jurisdiction of the CPUC.

2. Yes. SDG&E would be required to purchase electricity from the cogeneration facility on an as-available basis at the utility's avoided cost if the plant is a "Qualifying Facility" under the federal Public Utility Regulatory Policies Act (PURPA, 16 U.S.C. Chapter 46). The CPUC has adopted a standard contract for this. Other market mechanisms with SDG&E may be available, particularly under the Assembly Bill (AB) 1613 program, the Waste Heat and Carbon Emissions Reduction Act.

ADDITIONAL FACTS

The City lease for the MBC site and the Miramar Landfill site was granted by the Navy in October 1995 and was accepted by the Council with the adoption of San Diego Ordinance O-18218 (Oct. 2, 1995). The Navy owns the fee under the City lease and owns the remainder of MCASM which includes all land South of Miramar Road where the transmission line would be placed.

The Navy also owns the parcels which underlie Miramar Road at the relevant location where the existing sludge, centrate, and LFG pipelines are installed. The Navy granted the City a street and drainage easement for Miramar Road in 1974. Document No. 74-100592 recorded April 22, 1974. In 1999, the Navy permitted the widening of Miramar Road by granting additional easements for width. Navy Document No. N6871100RP00P07 recorded January 4, 2000 as Document No. 2000-0003487.

On November 9, 1995, the Navy granted the City an easement for the following facilities: a 16-inch sludge pipe, a 20-inch centrate pipe, a 30-inch reclaimed water pipe, a 10-inch LFG pipe, an 8-inch natural gas pipe, and a 4 inch fiber optic conduit. Department of Navy Document No. N6871195RP05P95. These pipelines were collectively referred to as the "Lines." This 1995 Lines Easement runs across MCASM from MBC to Miramar Road and is the primary easement connecting NCWRP with MBC. The existing City-owned LFG pipeline serving the existing North City Cogeneration Facility is in this easement. The remaining reach of the pipelines to NCWRP is in the Miramar Road easement.

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[4] Statutory references are to the California Public Utilities Code unless otherwise stated.

Miramar Road is a dedicated public street, and it is on land owned by the Navy at the relevant location. There are no other apparent land owners between the Navy's MCASM property and the City's NCWRP property at Eastgate Mall north of and adjacent to Miramar Road.

The proposed transmission line has not been designed but PUD staff anticipates it would follow the Lines Easement, which would be widened through an additional grant of easement width from the Navy. The reach of the transmission line across and along Miramar Road up to the NCWRP site would either be in a new easement from the Navy or in the City's existing roadway easements. The transmission line would be underground for the segments on the MCASM property north of the City landfill lease line. It would be underground for Miramar Road and Eastgate Mall segments as well.

LEGAL ANALYSIS

The notion that non-utility generators are typically prevented by law from transmitting or distributing electricity from one property to another non-adjacent property or across public streets is rooted in the statutory definitions of "public utility" and "electrical corporation." These designations matter because electrical corporations and public utilities are subject to the jurisdiction of the CPUC. Cal. Pub. Util. Code §§ 216, 218, 701, 1001. If CPUC jurisdiction attaches it is". . . extensive, and the commission is obligated to exercise it (§ 2101). It includes jurisdiction over rates (§ 728), services (§ 761), construction of plants and extensions thereof (§ 1001), issuance of securities (§ 816), and the disposing or encumbering of operative property (§ 851)." *Richfield Oil Corp. v. Public Utilities Commission*, 54 Cal. 2d 419, 431 (1960) (*Richfield Oil*). The prospect of such regulation could make the proposed arrangement non-viable, so it is important to examine the question at this initial stage of planning.

A. The Proposed Cogeneration Arrangement Would Not Create a "Public Utility" Electric Service Under Public Utilities Code Section 216

The first part of the question relating to possible CPUC jurisdiction centers on whether the owner of the plant is a "public utility" either under the meaning of article XII, sections 3 or 5 of the California Constitution, or under Section 216. The relevant part of article XII of the California Constitution provides:

> Section 3. Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of . . . or the production, generation, transmission, or furnishing of heat . . . power . . . directly or indirectly to or for the public . . . are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.
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> Section 5. The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of

> commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

Relevant parts of section 216 of the Public Utilities Code provide:

> (a) "Public utility" includes every . . . electrical corporation . . . where the service is performed for, or the commodity is delivered to, the public or any portion thereof.
>
> (b) Whenever any . . . electrical corporation . . . performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that...electrical corporation...is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.
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> (c) When any person or corporation performs any service for, or delivers any commodity to, any person, private corporation, municipality, or other political subdivision of the state, that in turn either directly or indirectly, mediately or immediately, performs that service for, or delivers that commodity to, the public or any portion thereof, that person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.
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> (d) Ownership or operation of a facility that employs cogeneration technology or produces power from other than a conventional power source or the ownership or operation of a facility which employs landfill gas technology does not make a corporation or person a public utility within the meaning of this section solely because of the ownership or operation of that facility.

The Legislature's power to confer jurisdiction to the CPUC is in the California Constitution. In constitutional terms, it may make a difference whether the proposed cogeneration plant is owned by the City or by a private concern. To establish CPUC jurisdiction under the Constitution, both of the following must be demonstrated: (1) that the California Constitution permits the Legislature to grant the CPUC such jurisdiction over municipally owned or privately owned electric corporations, and (2) that the Legislature has enacted a statute exercising this authority. *County of Inyo v. Public Utilities Com.*, 26 Cal. 3d 154, 160 (1980) (*Inyo,* a case which involved a municipally owned water corporation).

Article XII, section 3 of the California Constitution says that the Legislature may provide for the regulation of "[p]rivate corporations and persons" who own, operate, control, or manage plants for the generation of power or heat, or lines for the transmission of power and heat.

> It has long been held that the provisions of the constitution authorizing the Legislature to confer upon the Railroad Commission (now the CPUC) powers to supervise and regulate

> public utilities apply exclusively to private corporations and natural persons or associations of persons and do not include municipal corporations, even when engaged in the exercise of proprietary functions.

Water Users' & Taxpayers' Ass'n of Merced v. Railroad Commission of Cal., 188 Cal. 437, 443 (1922) (*Merced*), citing *City of Pasadena v. Railroad Commission,* 183 Cal. 526 (1920) (*Pasadena*).[5]

Since the City is not a private corporation or a natural person the Legislature has no authority under article XII, section 3 of the California Constitution to provide the CPUC with jurisdiction over the City's ownership or operation of an electrical power plant.

However, the Legislature may confer upon the CPUC the power to regulate municipal utilities if such statutes remain within the scope of article XII, section 5 of the California Constitution. *Pasadena*, 183 Cal. at 533. Thus possible legislation conferring CPUC jurisdiction over municipally owned water (or electric) companies selling beyond municipal borders or even within such borders, would fall clearly within the scope of present article XII, section 5 of the California Constitution. *Inyo*, 26 Cal. 3d at 162. This conclusion has practical effect only if such legislation has in fact been adopted by the Legislature. A review of current legislation disclosed no statutes where the Legislature has sought to confer jurisdiction in the CPUC to regulate municipal electric generating plants. Therefore, if the cogeneration plant were owned by the City, the CPUC would not have jurisdiction to regulate it.

If the cogeneration facility is privately owned and operated, it could be subject to CPUC jurisdiction as a public utility. From the constitutional provisions quoted above, article XII, section 3 of the California Constitution allows the Legislature to confer upon the CPUC the jurisdiction to regulate "private corporations and persons." Applying the law from the *Pasadena* and *Merced* cases it can be concluded that a private cogeneration plant owner would fall within this definition. Further, the Legislature has enacted statutes which confer to the CPUC the jurisdiction to regulate private owners of power plants. Cal. Pub. Util. Code §§ 216, 218, 701, 1001. To determine whether the proposed cogeneration facility would be subject to regulation as a public utility under any of these statutes if it were privately owned and operated, we turn to the law as it relates to public utilities and electrical corporations.

One of the implicit elements of a public utility is a dedication of assets to public use. Case law has recognized that the Legislature, by its repeated reenactment of the definition of public utilities without change, has accepted and adopted dedication to public use as an implicit limitation on that term. *Greyhound Lines, Inc. v. Public Utilities Com.*, 68 Cal. 2d 406, 413 (1968); *Richfield Oil v. Public Utilities Commission,* 54 Cal. 2d at, 428–30 (1960); *Independent Energy Producers Ass'n. v. State Bd. Of Equalization*, 125 Cal. App. 4th 425, 442 (2004) (*IEPA*).

"The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it

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[5] *Pasadena* and *Merced* were overruled on other grounds in *L. A. Metro Trans. Auth. v. Pub. Util. Com'n,* 59 Cal. 2d 863, 870 (1963), but remain intact with respect to municipal electric production and transmission.

its public character." *Thayer v. California Development Corp.,* 164 Cal. 117, 127 (1912) (*Thayer*). "This public use need not be a use general or common to all the people of the state alike. It may be a use in which a small portion of the public will be directly benefited, as a street in a town, a bridge or a railroad, necessarily local in its benefits and advantages, but it must be of such a character as that the general public may, if they choose, avail themselves of it." *Id.* at 129 (citing *Gilmer* v. *Lime Point,* 18 Cal. 229, 252 (1861)). *See also Story v. Richardson,* 186 Cal. 162, 167 (1921). The test for determining whether dedication has occurred is "whether or not (a person has) held himself out, expressly or impliedly, as engaged in the business of supplying (a service or commodity) to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as an accommodation or for other reasons peculiar and particular to them." *IEPA*, 125 Cal. App. 4th at 443 (citing *Van Hoosear v. Railroad Commission*, 184 Cal. 553, 554 (1920)).

Dedication to public use can occur without widespread sales of services or commodities to the public.

> In *Richfield Oil*, our Supreme Court pointed out that subdivision (c) of Public Utilities Code section 216, does not require service or delivery of a commodity to the public. (54 Cal. 2d at p. 428). The court held' . . . . a utility that has dedicated its property to public use is a public utility even though it may serve only one or a few customers.' (*Id.* at p. 431.)

Unocal California Pipeline Co. v. Conway, 23 Cal. App. 4th 331, 335 (1994).

In applying the foregoing principles to the proposed cogeneration facility arrangement, it can be concluded that even if the cogeneration facility were privately owned it would not be a public utility if the Purification Facility is the sole customer and if the City consumes the electric and thermal energy and does not resell it. It would be difficult to find that there is any dedication to public use under these circumstances. Generation not needed by the City could be sold to SDG&E on an as-available basis as discussed in Sections C and D below. To the extent that these sales of excess generation could constitute sale-for-resale, it still would be difficult to characterize the plant as being dedicated to public service. Such sale-for-resale transactions with SDG&E would be permissible outside of being a public utility if the plant meets Qualifying Facility criteria under PURPA by being either a "small power production facility" or a "cogeneration facility." The significance of meeting Qualifying Facility criteria is discussed further below in Section C. The fact that a public utility is not created by a private cogenerator selling only to the City and to SDG&E is made manifest by the existing Minnesota Methane San Diego LLC cogeneration systems at MBC and NCWRP. The only difference in the proposed new cogeneration facility arrangement would be that the production occurs at the former site and the sale and consumption at the latter site.

B. The Owner of the Plant Under the Proposed Arrangement Would Not Be an "Electrical Corporation" if it Utilizes "Cogeneration Technology" and "Landfill Gas Technology" and Sells its Product Only to the City and to SDG&E

Sections 216(a) and (b) apply to "electrical corporations." In California, an "electrical corporation" is subject to the jurisdiction of the CPUC if it "performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received. . . ." Cal. Pub. Util. Code § 216(b). The definition of "electrical corporation" is thus important to this analysis. That definition is contained in section 218, the relevant parts of which are reproduced in Appendix A.

Under section 218, there are several approaches that could be used to determine if the owner of the proposed cogeneration plant located at MBC and which serves the Purification Facility load at NCWRP would be an "electrical corporation" within the definition of the statute. In subsections 218(b) and (c), the statute contains exclusions from its general definition (contained in subsection (a)) for certain types of electricity producers who meet stated criteria. These exclusions should be the focus of analyses.

The purpose of these exclusions from the definition of "electrical corporation" is to foster the development of cogeneration and other renewable distributed generation technologies. This objective became state policy subsequent to the passage of PURPA by Congress in 1978. In 1984, California adopted Senate Bill 1773, which provided the cogeneration and renewable distributed generation exclusions in section 218(b).[6] However, while this statute was intended to encourage investment in distributed cogeneration and renewable fueled technologies by carving out these exclusions from being an "electrical corporation" under section 218(a), these exclusions also had material limitations embedded in them which include what has become known as the "over-the-fence rule."[7] The over-the-fence rule provides that an electricity producer may distribute its power only if the producer distributes it to two or less properties and only if such properties are located immediately adjacent to the property where the power is produced, as more particularly set forth in section 218(b)(2). As discussed below the over-the-fence rule in Section 218(b)(2) does present a problem for the proposed arrangement but section 218(b)(3) provides another exclusion if the load served belongs to a state or local agency.

1. The Over-the-Fence Rule Is a Barrier for the Proposed Project Under Section 218(b)(2)

The primary factor prompting this analysis is that the proposed transmission line would cross a public street (Miramar Road) to serve a property on the other side. section 218(b)(2) is one possible exclusion from the definition of "electrical corporation" but it is also the particular subsection that contains the over-the-fence rule, which has a constraining reference

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[6] *See* Lindl, *Letting Solar Shine: An Argument to Temper the Over the Fence Rule,* Ecology Law Quarterly Vol. 36 Issue 4, Article 3 pp. 851, 868-875 (2009).
[7] *Id.* at p. 871.

to properties that are divided by an intervening public street. The parts of the section 218 relevant to the current analysis of the over-the-fence rule reads:

> (b) "Electrical corporation" does not include a corporation or person employing cogeneration technology or producing power from other than a conventional power source for the generation of electricity solely for any one or more of the following purposes: (2) The use of or sale to not more than two other corporations or persons solely for use on the real property on which the electricity is generated *or on real property immediately adjacent thereto, unless there is an intervening public street constituting the boundary between the real property on which the electricity is generated and the immediately adjacent property and one or more of the following applies:* (A) The real property on which the electricity is generated and the immediately *adjacent real property is not under common ownership or control.* . . . (Emphasis added.)

With the over-the-fence rule, an electricity producer can sell only to tenants on the producer's own property or to no more than two immediately neighboring adjacent properties. The colloquial name of the rule comes from the practical effect that no more than two "next door neighbors" can be served by placing distribution connections "over-the-fence." Those two neighbors have to be on property immediately adjacent to the property where the electricity is produced. And significantly, there is an additional constraint in section 218(b)(2) that prevents this ability to serve an adjoining property if there is an intervening public street between the serving property and the served property and the two properties are not under common ownership or control. This limitation is problematic for the proposed cogeneration facility at MBC and the Purification Facility at NCWRP. The MBC site is on a City leasehold at MCASM, and the fee for both that leasehold as well as the remainder of MCASM is owned by the Navy. The property where the Purification Facility will be located is City owned.

Miramar Road is an intervening public street which at the relevant locations is dedicated upon roadway easements granted by the Navy. The facts that the fee under Miramar Road is owned by the Navy and that the City has road and drain easements does not change the fact that Miramar Road is a dedicated public street. The properties of MCASM and NCWRP are not under common ownership or control. Therefore the "intervening public street" and "not under common ownership" limitation in the over-the-fence rule prevents the application of section 218(b)(2) to this situation.

2. The Proposed Project Could Nonetheless Be Excluded from Regulation Under Section 218(b)(3)

A more promising potential exclusion is contained in section 218 (b)(3). This provides:

> (b) 'Electrical corporation' does not include a corporation or person employing *cogeneration technology* or producing power from other than a conventional power source for the generation of electricity solely for any one or more of the following purposes:

> (3) *Sale or transmission to an electrical corporation or state or local public agency, but not for sale or transmission to others, unless the corporation or person is otherwise an electrical corporation.* (Emphasis added.)

Since the electricity would be sold entirely or almost entirely to the City for its consumption only and not for City's resale to others, and because the City is a "local public agency," that part of the definitional test would be satisfied. Further, excess electrical generation not immediately needed for Purification Facility load, if any, would be sold only to SDG&E, an "electrical corporation," so that part of the test is also satisfied. The only remaining element of the definitional exclusion relates to the technology used to produce the power. Specifically, to obtain the exclusion under section 218(b)(3) the plant must be "employing cogeneration technology or producing power from other than a conventional power source. . . ."

"Cogeneration," otherwise known as Combined Heat and Power (CHP), is defined in section 216.6 and it will be important that the proposed facility meet these definitional requirements:

> "Cogeneration" means the sequential use of energy for the production of electrical and useful thermal energy. The sequence can be thermal use followed by power production or the reverse, subject to the following standards:
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> (a) At least 5 percent of the facility's total annual energy output shall be in the form of useful thermal energy.
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> (b) Where useful thermal energy follows power production, the useful annual power output plus one-half the useful annual thermal energy output equals not less than 42.5 percent of any natural gas and oil energy input.

If the facility does not meet this definition of "cogeneration" under section 216.6 it still may qualify for the exclusion from being an electrical corporation under section 218(b)(3) if it produces power from "other than a conventional power source." The term "conventional power source" is defined in section 2805:

> "Conventional power source" means power derived from nuclear energy or the operation of a hydropower facility greater than 30 megawatts or the combustion of fossil fuels, unless cogeneration technology, as defined in section 25134 of the Public Resources Code, is employed in the production of such power.

The proposed electrical generating plant for the Purification Facility loads is anticipated to operate primarily on LFG and digester gas. If sufficient quantities of LFG and digester gas are not available to supply its full capacity then the fuel supply may need to be augmented with natural gas, a fossil fuel. LFG and digester gas are not fossil fuels under section 2805 but there are no reported cases on section 218(b) which address the issue of whether the "other than conventional power sources" status could be lost by the combined use of any amount of natural gas, a fossil fuel. Reading this provision conservatively, the exclusion from regulation will more

likely be accepted by a court if the facility truly does meet the definition of "cogeneration" under section 216.6. That section relates to minimum amounts of the facility's energy output being put to work in the form of "useful thermal energy." It is important that the City provide for beneficial use of the statutory minimum amount of heat from the generation plant, so that it is truly a CHP plant. For example, the heat might be used in the operation of the Class A Biosolids Facility.

3. Exclusion from Regulation Under Section 218(c)(3)

Section 218(c)(3) provides another possible basis to exclude the proposed plant owner from coming within the definition of "electrical corporation." That subsection reads: "(c) "Electrical corporation" does not include a corporation or person employing *landfill gas technology* for the generation of electricity for any one or more of the following purposes: (3) Sale or transmission to an electrical corporation or state or local public agency." (Emphasis added.) Analysis under this subsection is the same as the exclusion under section 218(b)(3) discussed above, the only difference being that the term "landfill gas technology" is used instead of "cogeneration technology." The term "landfill gas technology" is defined in section 224.2 as follows:

> "Landfill gas technology" means the process of extraction of gas or gaseous compounds from sanitary landfill areas which gas or compound was generated as a byproduct of the materials composing the landfill. For purposes of this division, real estate, fixtures, and personal property including gas extraction wells, engines and compressors for gas removal or storage, gas cleaning or rectifying equipment, equipment for the generation or production of steam, electricity, heat, or other form of energy through the use of landfill gas, and facilities for the transmission or distribution of landfill gas or other form of energy generated or produced therefrom shall not be considered an electrical, gas, or heat plant or pipeline.

Since the new project would utilize "landfill gas technology" as defined, a good argument exists that section 218(c)(3) would exempt the owner from regulation as an "electrical corporation." A caveat exists here, however, with respect to the possible need to add natural gas to the fuel supply to increase capacity. As with the analysis above on section 218(b)(3) dealing with electrical generating plants that operate on an "other than a conventional fuel source," there are no reported decisions on the question of whether the fuel source must be 100% LFG in order to avail the exception for "landfill gas technology" under section 218(c). Certain state financial incentive programs condition eligibility on a minimum percentage of renewable fuel in the supply.[8] LFG would be the primary fuel for the proposed project, but any mixing or adding of natural gas to the fuel supply might create issues if the sole reliance for exemption is on section 218(c). The surest basis for exemption therefore remains section 218(b)(3) and its reference to cogeneration technology.

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[8] For example, under California's Self Generation Incentive Program for renewable distributed generation, a project must prove the availability of an adequate average flow rate of renewable fuel to meet at least 75% of the generator's total fuel consumption for 10 years. *2016 Self Generation Incentive Program Handbook* Section 4.3.1.1.

C. The Proposed Project Would Benefit from Being Certified As a Qualifying Facility Under PURPA

As mentioned in part A above, there are certain benefits that the proposed project could avail if it obtains Qualifying Facility (QF) status under PURPA.[9] QFs have the right to sell energy and capacity to a utility,[10] provided the purchasing utility has not been relieved from its QF purchase obligation.[11] With limited exceptions, QFs generally have the option of selling to a utility either at the utility's Short Run Avoided Cost (SRAC) or at a negotiated rate. SRAC is the incremental cost to an electric utility of electric energy or capacity which, but for the purchase from the QF, the utility would generate itself or purchase from another source.[12] Significantly, QFs also generally have the option to sell energy either "as-available" (i.e., as the QF determines such energy to be available for such purchases) or as part of a legally enforceable contract for delivery of energy or capacity over a specified term.[13] QFs have the right to purchase supplementary power, standby power, maintenance power, and interruptible power at rates which are just and reasonable, based on accurate data and consistent system-wide costing principles, and that apply to the utility's other customers with similar load or cost-related characteristics.[14] QFs also have the right to interconnect with a utility by paying a nondiscriminatory interconnection fee approved by CPUC.[15] In order to become a QF, a cogenerator or small power producer with more than 1 MW nameplate capacity must file with the FERC an application for certification or notice of self-certification that establishes that it meets the FERC efficiency standards.[16] Obtaining QF status would ensure that the new cogeneration facility has at least one option for the sale and disposition of electricity through SDG&E (though it bears mention that the SRAC price for the power would be relatively low).

CPUC Decision D.10-12-035 adopted a "Qualifying Facility and Combined Heat and Power Program Settlement Agreement" among California's utilities and other parties interested in CHP. That decision establishes the framework and terms upon which SDG&E would be required to purchase electricity from the new cogeneration facility if no other market-based terms could be successfully negotiated or bid. In any case, the cogeneration facility would need to be connected to the utility system under SDG&E's Electric Rule 21.

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[9] *See generally* Federal Energy Regulatory Commission (FERC): http://www.ferc.gov/industries/electric/gen-info/qual-fac/benefits.asp.

[10] 18 C.F.R. § 292.304.

[11] 18 C.F.R. §§ 292.309-292.311.

[12] 18 C.F.R. § 292.101(b)(6).

[13] 18 C.F.R. § 292.303 (subject to non-termination of such obligation under 18 C.F.R. § 292.309 per FERC Order 688, 71 Fed. Register 64372, Nov. 1, 2006; 71 Fed. Register 75662, Dec. 18, 2006. The utility's obligation to purchase as-available energy and capacity still generally exists for CHP and small power production facilities of 20 MW or less).

[14] 18 C.F.R. § 292.305.

[15] 18 C.F.R. § 292.306.

[16] 18 C.F.R. §§ 292.203(b) and (d); 292.207.

D. The Proposed Project Could Participate In the Assembly Bill 1613 Program

The Waste Heat and Carbon Emissions Reduction Act, Assembly Bill (AB) 1613[17] provides another possibility for the sale and disposition of LFG generated electricity through SDG&E either before the Purification Facility load materializes or afterward as excess power. Adopted in 2007, AB 1613 mandated that the CPUC adopt feed-in tariffs for California's investor owned utilities pursuant to which the utilities are required to pay eligible generators for excess electricity delivered to the utility grid. Section 2840.2(b) defines "eligible customer generator" as follows:

> (b) "Eligible customer-generator" means a customer of an electrical corporation that meets both of the following requirements:
>
> (1) Uses a combined heat and power system with a generating capacity of not more than 20 megawatts, which first commences operation on or after January 1, 2008.
>
> (2) Uses a time-of-use meter capable of registering the flow of electricity in two directions. If the existing electrical meter of an eligible customer-generator is not capable of measuring the flow of electricity in two directions, the eligible customer-generator shall be responsible for all expenses involved in purchasing and installing a meter that is able to measure electricity flow in two directions. If an additional meter or meters are installed, the electricity flow calculations shall yield a result identical to that of a time-of-use meter.

In turn, section 2840.2(a) defines "combined heat and power system":

> (a) "Combined heat and power system" means a system that produces both electricity and thermal energy for heating or cooling from a single fuel input that meets all of the following:
>
> (1) Is interconnected to, and operates in parallel with, the electric transmission and distribution grid.
>
> (2) Is sized to meet the eligible customer-generator's onsite thermal demand.
>
> (3) Meets the efficiency standards of subdivisions (a) and (d), and the greenhouse gases emissions performance standard of subdivision (f) of section 2843.

Subdivision (f) of section 2843 in turn references the greenhouse gas emission standards established by the California Energy Commission (CEC) and the State Air Resources Board

[17] AB 1613 (Stats. 2007, ch. 713.), Cal. Pub. Util. Code §§ 2840-2845.

pursuant to section 8341. Without fully citing those requirements, it is sufficient to say generally that the requirements are that the facility must meet an output-based test based on a calculation of emissions of greenhouse gases for cogeneration which recognizes the total usable energy output of the process, and includes all greenhouse gases emitted by the facility in the production of both electrical and thermal energy.[18] Also, the facility would need to meet criteria set by the CEC and State Air Resources Board for emissions of greenhouse gases by facilities generating electricity from biogas or landfill gas, to ensure that the calculation of net emissions accounts for the process of growing, processing, and generating the electricity from the fuel source.[19] It is assumed that the facility would be designed to meet these requirements.

CPUC Decision D.09-12-042 (as modified by Decision 10-04-055) adopted the policies and procedures for purchase of excess electricity from eligible CHP systems by electrical corporations under AB 1613. The decision included adoption of a standard contract available to all eligible CHP systems up to 20 MW and which the utilities must offer to eligible customer generators. This fact coincides well with the planned capacity of the cogeneration plant for the Pure Water Program. The compensation available for the generation under the AB 1613 program and D.09-12-042 likely exceeds the SRAC amount that is available to QFs under PURPA and D.10-12-035, so it would benefit the City to ensure that the new facility is designed to be eligible for an AB 1613 contract.

CONCLUSION

Legal bases exist under section 218(b)(3) for the planned cogeneration facility at MBC to serve City load at the City-owned Purification Facility via a City-owned transmission line. If the new facility is certified as a QF then SDG&E will be required to purchase electricity from it on an as-available basis per PURPA requirements. SDG&E should also be required to purchase the excess power if the new facility meets all AB 1613 criteria, and this may yield a higher price for the energy than would be available if the facility sold solely on the basis of being a QF.

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Attachment: Appendix A

[18] Section 8341(d)(3)
[19] Section 8341(d)(4)

APPENDIX A

California Public Utilities Code

Section 218 (relevant parts)

(a) "Electrical corporation" includes every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this state, except where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others.

(b) "Electrical corporation" does not include a corporation or person employing cogeneration technology or producing power from other than a conventional power source for the generation of electricity solely for any one or more of the following purposes:

(1) Its own use or the use of its tenants.

(2) The use of or sale to not more than two other corporations or persons solely for use on the real property on which the electricity is generated or on real property immediately adjacent thereto, unless there is an intervening public street constituting the boundary between the real property on which the electricity is generated and the immediately adjacent property and one or more of the following applies:

(A) The real property on which the electricity is generated and the immediately adjacent real property is not under common ownership or control, or that common ownership or control was gained solely for purposes of sale of the electricity so generated and not for other business purposes.

(B) The useful thermal output of the facility generating the electricity is not used on the immediately adjacent property for petroleum production or refining.

(C) The electricity furnished to the immediately adjacent property is not utilized by a subsidiary or affiliate of the corporation or person generating the electricity.

(3) Sale or transmission to an electrical corporation or state or local public agency, but not for sale or transmission to others, unless the corporation or person is otherwise an electrical corporation.

(c) "Electrical corporation" does not include a corporation or person employing landfill gas technology for the

generation of electricity for any one or more of the following purposes:

(1) Its own use or the use of not more than two of its tenants located on the real property on which the electricity is generated.

(2) The use of or sale to not more than two other corporations or persons solely for use on the real property on which the electricity is generated.

(3) Sale or transmission to an electrical corporation or state or local public agency.

(d) "Electrical corporation" does not include a corporation or person employing digester gas technology for the generation of electricity for any one or more of the following purposes:

(1) Its own use or the use of not more than two of its tenants located on the real property on which the electricity is generated.

(2) The use of or sale to not more than two other corporations or persons solely for use on the real property on which the electricity is generated.

(3) Sale or transmission to an electrical corporation or state or local public agency, if the sale or transmission of the electricity service to a retail customer is provided through the transmission system of the existing local publicly owned electric utility or electrical corporation of that retail customer.